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No. 91-1300

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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Respondent offers only one reason why this case does not warrant further review: In her view, the Fourth Circuit did not hold unconstitutional the obstruction of justice enhancement in Sentencing Guidelines § 3C1.1 as applied to a defendant who commits perjury while testifying at trial. Instead, the Fourth Circuit simply held that the district court erred in basing its conclusion that respondent committed perjury solely on the fact that respondent testified and was convicted. Br. in Opp. 1.

That interpretation of the Fourth Circuit's decision is incorrect. Respondent can point to nothing in the Fourth Circuit's opinion supporting her position; instead, she relies entirely on a portion of the district court's remarks at sentencing. Br. in Opp. 3. Although we believe that respondent has misread the district court's

comments, it is the Fourth Circuit's decision that is now before this Court. And the judges of that court gave a detailed explanation why "[o]ur sense of justice requires us to disagree," Pet. App. 10a, with the holdings of seven other circuits that Sentencing Guidelines § 3C1.1 may constitutionally be applied to a defendant who commits perjury while testifying at trial. See Pet. App. 9a-15a.

The Fourth Circuit's subsequent decision in *United States* v. *Craigo*, 956 F.2d 65 (1992), makes clear that its holding in this case adopts the broad proposition that the Constitution forbids a district court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 for perjury. As the court wrote, *id.* at 68:

> Although we are of the opinion that the district court's conclusion that Craigo's testimony was ludicrous and perjurious is supported by the evidence and is not clearly erroneous, *United States v. Dunnigan* does not permit a district court in sentencing to enhance a guidelines sentence under Guideline § 3C1.1 for lying testimony by a defendant in denial of the charges against him because that guideline is an intolerable burden on the defendant's right to testify. [*United States* v.] *Dunnigan*, 944 F.2d [178,] 185 [(4th Cir. 1991)].

The decision in *Craigo* thus shows that the Fourth Circuit—which failed by an evenly-divided vote to rehear this case en banc—believes that its decision in this case flatly bars district courts from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 for perjury.

As we explained in our petition, the question whether Sentencing Guidelines § 3C1.1 can constitutionally be applied in circumstances like the ones at issue in this case is a question that will arise with considerable frequency in federal criminal prosecutions. Because the Fourth Circuit is committed to its minority position, review by this Court is necessary in order to restore the uniformity that existed before the Sentencing Guidelines went into effect

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

MAY 1992